No. (1)

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In The Supreme Court of the United States

ROY LEONARD COGGINS,
Petitioner,

v.

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

In this case the Fourth Circuit chose to ignore the rules regarding the treatment of evidence on appeal and to substitute its judgment for that of the jury. As a result, it overruled *Tennant v. Peoria, etc.*, 321 U.S. 29; 88 L.2d 520 (1944). If the Fourth Circuit had followed *Tennant*, the jury verdict would have been affirmed. This was not a mistake; the Fourth Circuit cited the correct rule in its opinion and then systematically ignored it.

CORPORATE DISCLOSURE

There are no corporate parties to this appeal.

TABLE OF CONTENTS

Question Presented for Review i

Corporate Disclosure ii

Opinions Below 1

Jurisdiction 1

Statutory Provisions 1

Statement of the Case 2

A. Nature Of The Case 2

B. Coggins Never Refused To Comply With An Order 4

C. There Was No Independent Investigation 6

D. Disposition Of Courts Below 10

Reasons for Granting the Writ 10

Conclusion 14

TABLE OF AUTHORITIES

Pages

CASES:

Bessye Neal v. Director,
District of Columbia Department of Corrections,
No. CIV.A.93-2420 ..... 8, 9

Duke v. Uniroyal,
928 F.2d 1413 (4th Cir. 1991) at 1420 ..... 10, 11

Frederick Douglas Kneibert v.
Thomson Newspapers, Michigan, Inc.,
129 F.3d 444 (8th Cir. 1997) 13

Hong v. Children's Memorial Hospital,
993 F.2d 1257 (7th Cir. 1993) 13

Jacobs v. College of William & Mary,
517 F.Supp. 791 (E.D. Va. 1980),
aff'd. 661 F.2d 922 (4th Cir.) *cert.* denied,
454 U.S. 1033, 102 S.Ct. 572,
70 L.Ed.2d 477 (1981) 13

Masden v. Travelers Insurance,
52 F.2d 75 (8th Cir. 1938) 11-12

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 361 L.Ed.2d 668,
93 S.Ct. 1817 (1973) 13

Tennant v. Peoria, etc.
321 U.S. 29; 88 L.2d 520 (1944) ..... i, 10, 11

United States v. Tobias,
889 F.2d 1375, 1378 (4th Cir. 1990) 11

RULES

Rule 4 of the *Federal Rules of Civil Procedure* 1

Rule 8 of the *Federal Rules of Civil Procedure* 11

PETITION FOR A WRIT OF CERTIORARI

Roy Coggins petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported, it is included in the Appendix. The District Court's judgment is included in the Appendix.

JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on April 13, 1999. The Motion for Rehearing and Reconsideration *en banc* was timely filed. The appellate jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Civil Procedure.

STATUTORY PROVISIONS

There are no statues relevant to the issues in this appeal.

STATEMENT OF THE CASE

A. Nature of Case

Roy L. Coggins ("Coggins") was a career employee of the District's Department of Corrections. When the rating at the Central Facility, the largest food service facility at Lorton, dropped to a dangerous level, Coggins, a Chief Steward, was called in to fix the problems. By dint of extraordinary personal effort, Coggins succeeded in a very short time in turning the Central Facility into an exemplary food service operation.

Coggins' boss, Francis Henderson ("Henderson"), said of Coggins' work at Central Facility that it was "outstanding." (Opinion at 6). Henderson's boss, Vincent Gibbons ("Gibbons") agreed that Coggins was extremely valuable to the institution. He went even further, according to Gibbons: Coggins was the most successful Chief Steward ever at the Central Facility.[1] It was after his difficult but extremely successful performance at Central Facility that trouble began for Coggins.

Coggins' reward for his success in turning Central Facility around was to be set up and fired because he is white. His tormentor was Henderson, his African American boss. Ultimately, Coggins was replaced as Chief Steward at Central Facility by a less qualified African American employee. The pretext used by Henderson was he alleged that Coggins had refused to rate his employees after he was ordered to rate them on or before close of business Thursday, June 1. (App. 22). But, Coggins never refused to rate his

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[1] [Gibbons]
"The DCRA Rating that Mr. Coggins achieved . . . was a 97 and that is one of the highest scores that has been achieved at an institution that I know of, and I think it's the highest score that Central ever earned . . ." (JA, Gibbons at 350).

subordinates. [2] [3] Worse for the District, Coggins was in the hospital on the day he was required to turn in his ratings. (App. 5). Before he could regain his health and return to work, Coggins had already been fired. *Ib.*

There are two material facts set forth in the Fourth Circuit's Opinion, dated February 19, 1999, which the Fourth Circuit simply changed in order to reverse the jury. The Fourth Circuit found in its Opinion that Roy Coggins ("Coggins") had admitted that he had refused an order and thereby committed insubordination when, in fact, Coggins' sworn testimony, by which the Fourth Circuit was bound since Coggins had prevailed below, was that he had never refused any such order. Second, the Fourth Circuit found as a fact that there had been an independent investigation of the charges against Coggins, but this, too, is simply untrue. As set forth below, there never was such an investigation, and there is ample evidence, both direct and inferential, in the record which proved this. [4] [5] [6] (App. 15-16).

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[2] [Coggins]
"He [Gibbons] told me he had talked to Mark Levitt. And he told me, he said, there shouldn't be any problems, so do them evaluations . . . I said the only way I'd do the evaluations is under duress . . . He told me he didn't care how I done it as long as I done them." (JA, Coggins at 194).

[3] [Coggins]
Q. In the first discussion you had just refused to do those evaluations; isn't that right?
A. I had not refused." (JA, Coggins at 203)

[4] [Henderson]
Q. Did you have any discussions . . . Mr. Braxton, prior to the reduction?
A. No. (JA, Henderson at 124).

Therefore, the deciding and originating officials never talked.

[5] [Krull]

If Coggins did not disobey the order, then there is no legitimate non-discriminatory reason to justify Coggins' termination. If there is no independent investigation, then the taint of Henderson's admittedly discriminatory *animus* is not purged, and it fatally infects the decision to terminate Coggins. If given their proper effect, either of these two material facts are sufficient to require this Court to change the Fourth Circuit's result to an affirmance of the jury's verdict. In effect, because these material facts were improperly ignored in the decision, the Fourth Circuit reversed the jury because it disagreed with material facts found by the jury.

B. Coggins Never Refused To Comply With An Order.

Officially, as noted in the Opinion, Coggins "was allegedly fired because he refused to complete required annual personnel evaluations. . ." (App. 2). This charge and its factual predicate were rejected by the jury and the trial judge, but were sustained by the Fourth Circuit.

Coggins **never** "refused to complete the evaluations." Although it is stated several times in the Fourth Circuit's Opinion that Coggins "refused," this "fact" is clearly wrong. (App, 3, 4, 8) Coggins' testimony was that he told Henderson that he "didn't feel comfortable doing the

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Q .In reaching your decision did you consult with anyone.
A. No. . . (JA, Krull at 296)

Therefore, the reviewing official never talked to anyone.

[6] [Krull]
Q. You didn't make any independent investigation of whether that was insubordination or not.
A. No, Sir. (JA, Krull at 318)

Therefore, the reviewing official made no investigation.

evaluations. . .," "I had not refused.", and finally, Coggins told Gibbons that ". . . I'd do the evaluations under duress.". Gibbons replied that ". . . He didn't care how I done it as long as I done them." *Ib.* The question of whether Coggins "refused" was at issue in the trial. It was decided by the jury in Coggins' favor. The Fourth Circuit changed that result, by changing the facts.

While it is true that Coggins never in fact evaluated his subordinates, this was because he was in the hospital from May 24 until late August of 1995 and was physically incapable of writing the evaluations. It was never contested at trial that the only reason Coggins did not timely file the evaluations was that he was hospitalized because he was very sick as a result of medication prescribed for him by a doctor after the May 24, 1995 meeting with Henderson where Coggins was ordered to complete the evaluations. There was no evidence presented that would indicate that Coggins still had a duty to complete the evaluations even though he was in the hospital.

While the Fourth Circuit's Opinion states that Henderson "recommended that Coggins be fired for insubordination," (App. 4), Coggins was officially "cited for his refusal to carry out assigned duties and responsibilities." (App. 23). That is, the sole charge was: Did Coggins refuse, or not? Coggins was never charged with being "insubordinate" in any other way. Either the factual charge that Coggins refused to evaluate his subordinates had to stick, or there was absolutely no factual basis for any adverse personnel action against Coggins. For example, even though he said in his Request for Disciplinary Action that Coggins had refused to accept the evaluation sheets, Henderson admitted at trial that Coggins already had the evaluation sheets well prior to the May 24, 1995 meeting. [7] [8]

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[7] [Henderson]
Q. . . . You sent Mr. Coggins the rating sheets, right?
A. Yes, sir. (JA, Henderson at 85)

C. There Was No Independent Investigation.

Contrary to the assertion in the Fourth Circuit's Opinion, the District did **not** independently investigate or verify Henderson's allegations. It did not happen. There is no evidence to support this assertion, and there is ample evidence that was ignored by the Fourth Circuit that is opposite. The Disinterested Designee admits in her report that she made no independent investigation. She relied on the allegations presented by the Proposing Official, Henderson, and the written response filed on Coggins' behalf by his wife while he was in the hospital. (App. 15-16). She never talked to Henderson or anyone else except Mrs. Coggins, who said she would file a written reply. (App. 15-16).

The Deciding Official was Mr. Bernard Braxton ("Braxton"), an African American. (App. 5). [9] Braxton also made no investigation, he did not even talk to Henderson

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[8] The Fourth Circuit's Opinion made several changes to the facts. For example, the Opinion notes that Coggins received two copies of the Notice, (JA at 492), but goes on to state Coggins did not file a written response. The Fourth Circuit's Opinion states that this might be a waiver of Coggins' right to show that he did not in fact refuse a valid order. (Opinion at 7). However, the written response was to be filed with Regina C. Gilmore, the Disinterested Designee. (JA at 492). In her report Ms. Gilmore notes that she talked with Rebecca Coggins, Coggins' wife, who stated that she would file a written response in Coggins' behalf. While a copy of the written response was not filed in the Joint Appendix filed below, Ms. Gilmore stated that she reviewed "the facts presented by the Proposing officials and **the Respondent**. . ." (JA at 496)(Emphasis added). And we have Coggins' uncontradicted direct testimony that his wife did in fact file a written response. ("Yes, sir, I did.") (JA at 53-4). What Ms. Gilmore reviewed was Coggins' written response filed by his wife. So this "fact" too is wrong and, again, the evidence favorable to Coggins was ignored by the Fourth Circuit.

[9] Q. And he is an African American?
A. That is correct." (JA, at 149)

prior to terminating Coggins. The paperwork which Braxton as the Deciding Official relied upon to terminate Coggins included only the two letters by Henderson and the report of the Disinterested Designee which was itself at least partially based on the same two letters prepared by Henderson. That is all that Warden Paul Krull ("Krull") found in the file used by Braxton when he reviewed the decision. Krull admitted that he, too, made no independent investigation.

Worse, assuming Krull was in the chain of command or that he was the Deciding Official, or that he was the person that supposedly made the independent investigation, there is ample evidence that Krull was involved with Henderson in his racially motivated plan to get Coggins fired. Coggins said that Hessing's unsubstantiated charge against him was the beginning of Henderson's racially motivated campaign to remove him. [10] [11] And, importantly, he stated that already at this early date Krull was working with Henderson to get Coggins out of the Department.[12] Incredibly, the Fourth Circuit found "Coggins did not offer any evidence to contradict Krull's testimony or credibility..." (App. 8). The only way the Fourth Circuit could say this

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[10] [Coggins]
Q. All right, which other discussions did you have with Mr. Henderson regarding Denise Hessing?
A. I asked him point blank what he had promised Ms. Hessing.
Q. And did Mr. Henderson answer that question?
A. He told me, you white mother fucker, I don't have to tell you nothing." (JA, Coggins at 187-188)

[11] [Coggins]
"I saw they were trying to set me up." (JA, Coggins at 205).

[12] [Coggins]
Q. Who was telling you to retire?
A. . . . Paul Krull. (JA, Coggins at 41).

would be if they weighed and then had rejected Coggins' testimony on this issue.

As further evidence of his lack of independence, Krull admitted that, what ever the rules might officially allow, a single incident, even one such as was alleged, would **not** support termination as the penalty. [13] [14] [15] Krull admitted that he did not normally overrule the Disinterested Designee, but he could not say why he did so in Coggins' case. The penalty given to Coggins was thus admitted by Krull to be excessive, disproportionate and unequal. But no reason was given by the Department why Coggins was treated differently from everyone else.[16]

According to Coggins the removal of Hessing from the people he had to rate was an admission that he was right

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[13] [Krull]
"We use progressive discipline, you go from a reprimand/warning, fivedays on the street, 45 days on the street, termination." (JA, Krull at 310).

[14] [Krull]
"Well termination doesn't come on a single act. It's a progressive discipline. There has to be more acts in his past to warrant this." (JA, Krull at 312).

[15] [Krull]
Q. Isn't it true a single incident such as this would not support termination?
A. Yes. (JA, Krull at 315).

[16] The "facts" changed by the Fourth Circuit are too numerous to list, but this one deserves special notice. Mr. Coggins was **not** one of "several named defendants" in a class action sexual harassment lawsuit. This "fact" is wrong. In fact, Coggins was charged with sexual harassment by Denise Hessing, but he prevailed and this charge was dismissed as unfounded. [Coggins said, "I was charged with sexual harassment by Ms. Hessing, and I beat that charge. . ." (JA, Coggins at 40)]. This fact was never disputed at trial, Where the Fourth Circuit got the completely erroneous idea that Coggins was a party to the case known as *Bessye Neal v. Director, District of Columbia Department of Corrections*, No. Civ.A.93-2420 is unknown.

to be worried about rating someone that had made a charge of sexual harassment against him. The District finally admitted that if it was wrong for Coggins to rate Hessing, it was just as much a violation of Judge Lambreth's injunction to order Coggins to rate her witnesses. [17] As far as Coggins was concerned, the final part of this racially motivated charade was the pretextural removal of Coggins for allegedly refusing to obey an order that was not due for six (6) days to rate people that under the District's own personnel rules Coggins was expressly prohibited from supervising, and under Judge Lambreth's order in the *Neal* case, Coggins was also expressly prohibited from rating.

Clearly the Fourth Circuit improperly rejected Coggins' testimony *in toto*.

The official that proposed Coggins' termination, Henderson, and the Deciding Official, Braxton, that overruled the Disinterested Designee were both African Americans. The man that signed the order removing Coggins from his position, Krull, was part of this racially motivated conspiracy from the beginning. Coggins proved racial *animus* motivated the charges against him. Coggins proved the penalty was disproportionate, that it exceeded the normal penalty, and no rationale was ever put forth by the District to explain this unequal and clearly pretextural treatment. Coggins was replaced by an African American who, while qualified (Coggins had trained her), was not as well qualified for the job as he was. This African American replacement was arranged in part by Henderson, the same African American that originally proposed firing Coggins because of his racial *animus*. and by Braxton, the African

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[17] [Gibbons]
Q. To my knowledge, four people have gone to jail, have served time, I believe. In fact, six were convicted of some form of retaliation.
Q. And that was retaliation against principals or witnesses or both?
A. Both. (JA, Gibbons at 381).

American that had fired Coggins. [18] The District never articulated a legitimate non-discriminatory reason for these racially discriminatory actions.

D. Disposition Of Courts Below.

The jury entered its verdict in favor of Coggins on July 8, 1997. The Fourth Circuit reversed the jury on February 19, 1999. Coggins timely appealed this reversal.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit refused to follow this court's controlling precedent and instead analyzed, accepted and rejected testimony just as though it was the jury.

This Court has repeatedly said that as an appellate court it will assume that testimony in favor of plaintiffs was credible, unless totally incredible on its face, and ignore evidence offered to rebut it. *Tennant, supra.*. This is what the Fourth Circuit was required to do when it reviewed the appeal of this case.

However, in effect the Fourth Circuit has overruled *Tennant* and all the other cases that stand for this including its own cases such as *Duke v. Uniroyal*, 928 F.2d 1413, 1420 (4th Cir. 1991). The Fourth Circuit was required to view the evidence most favorably to Coggins and to give Coggins the benefit of all reasonable inferences, *United States v. Tobias*,

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[18] [Gibbons]
"We (Henderson and Gibbons) made an arrangement to pull a senior steward. . ."
and then
"And I managed through Mr. Braxton's office to have her temporarily assigned to Central. . ." (JA, Gibbons at 367-68).

889 F.2d 1375, 1378 (4th Cir. 1990). But it did not. It repeatedly and improperly weighed the evidence and rejected all testimony favorable to Coggins.

At least with respect to the effect of a jury verdict, the writ of this Court now stops at the Potomac River. Since the Fourth Circuit did not see the witnesses, it was required to accept as true all of the evidence that supported the jury's verdict, *Tennant, supra.*, and ignore evidence offered to rebut it. *Duke, supra* at 1418. Instead of following the rule laid down by this Court it rummaged through the record to find evidence that supported a reversal of the jury. Worse, as is set forth below it created a new defense for the District, and then created an independent investigation when there is no evidence of one.

Incredibly, the Fourth Circuit expressly admits in its decision that is not accepting Coggins' testimony. "Even if we accept Coggins' claim. . ." (App. 8). Under *Tennant* the Fourth Circuit was bound to accepts Coggins' claims, he had prevailed below. Then, in order to defeat Coggins' clear testimony the Fourth Circuit itself created a defense that was never put forward by the District at trial. The District did not offer this defense because it is demonstrably untrue. In spite of the Fourth Circuit's groundless assertion, Coggins did not waive any defense by failing to file a written reply. He filed the required written reply.

Thus, there was no "waiver" of the defense that Coggins agreed to do the evaluations. (App. 8). Even if there had been waiver, this was not pled or raised by the District below. Rule 8 of the Federal Rules of Civil Procedure requires that a waiver be specially pled. Since it was not raised below, under established rules of this Court it could not be raised for the first time on appeal, by the Fourth Circuit itself. It is at best an affirmative defense that should have been proved, *Masden v. Travelers Insurance*, 52 F.2d 75 (8th Cir. 1938) and is never presumed as the Fourth Circuit's Opinion apparently does.

Having created a new defense, *ie.*, waiver, at the appellate level the Fourth Circuit then goes on to create an "independent investigation" that also never took place. But what was this investigation? As set forth in the Statement of Fact, nobody ever talked to Coggins. Even the Disinterested Designee made no real investigation. She relied on the facts presented by the Proposing Official, Henderson, and the written response filed on Coggins' behalf by his wife while he was in the hospital. (App. 16). An investigation, such as the Disinterested Designee's, that admittedly did not talk to any of the participants and expressly relied on the racially motivated charges and factual allegations of Henderson is neither independent, nor useful.

Coggins proved Henderson was a racist. (App. 6, 7). He proved that Henderson, an African American, initiated the charges against Coggins as a result of racial bias. He proved the charge Henderson filed against Coggins was a clear pretext, that in fact Coggins had never refused an order.

Coggins proved that Henderson, Braxton and Krull repeatedly violated the rules and the progressive spirit of the rules when dealing with Coggins and that they treated him differently than others. He proved that Henderson, Braxton and Krull had no explanation for this disparate treatment. He proved the penalty applied to him was disproportionate. He proved Henderson, Braxton and Krull had no explanation for this. He proved Henderson effectively supplied all of the information used by the deciding official to terminate Coggins. He proved there was no independent investigation. He proved that the Deciding Official, Braxton, was an African American.

He proved that Krull, although a white man, was a part of the group that tried to force Coggins out of the department and that Krull influenced Coggins' termination. Contrary to the finding of the Fourth Circuit Coggins expressly put Krull's credibility in issue. Coggins proved he was replaced by a less qualified African American chosen by Henderson, Braxton and Gibbons. All of this tends to

indicate that the basis for the firing was a mere pretext. All of these are facts which the Fourth Circuit was required to accept as true but which are totally ignored in the Fourth Circuit's Opinion.

If the late Justice Powell's words in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 361 L.Ed.2d 668, 93 S.Ct. 1817 (1973), mean anything at all, and these facts are considered the way they are supposed to be considered, then this Opinion must be reversed. Coggins suffered racial discrimination. He was fired because of that. He proved his case to a jury. He deserves his judgement.

If either of these two material facts had been properly considered by the Fourth Circuit, specifically that Coggins did not ever refuse an order and that there was no independent investigation, then the Fourth Circuit's holding must be reversed. Several courts have noted that this Court has purposefully made it relatively simple for a plaintiff to establish a *prima facie* case of discrimination. The elements of a *prima facie* case and the subsequent burden shifting as set forth in *McDonnell Douglas Corp., supra,* are designed to assure that the plaintiff has his day in court despite the difficulty in obtaining direct evidence in such cases. *Young in Hong v. Children's Memorial Hospital,* 993, F.2d 1257 (7th Cir. 1993); *Frederick Douglas Kneibert v. Thomson Newspapers, Michigan, Inc.*, 129 F.3d 444 (8th Cir. 1997). According to this Court this is enough to send the case to the jury, but the Fourth Circuit obviously disagrees.

Thus, the question for this Court, just as it was for the Fourth Circuit, is not whether Coggins should win, but whether Coggins raised a jury question. *Jacobs v. College of William & Mary*, 517 F.Supp. 791 (E.D. Va. 1980), aff'd. 661 F.2d 922 (4th Cir.) *cert.* denied, 454, U.S. 1033, 102 S.Ct. 572, 70 L.Ed.2d 477 (1981). Since Coggins raised jury questions and the jury has decided, the Fourth Circuit must be overruled.

It is impossible to prevail on appeal when the Fourth Circuit only genuflects in the direction of this Court's

controlling precedents, while it rewrites the jury's verdict. Coggins' case would have been affirmed if the Fourth Circuit had merely followed the rules.

CONCLUSION

For all of these reasons this Fourth Circuit's Opinion of February 19, 1999, should be overruled and jury's verdict reinstated.

Respectfully submitted,

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TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered February 19, 1999 ..... App. 1

Order Denying
Petition for Rehearing and Rehearing En Banc
United States Court of Appeals
for the Fourth Circuit
entered March 16, 1999 ..... App. 12

Judgment,
United States District Court,
Eastern District of Virginia
entered July 8, 1997 ..... App. 14

Memorandum to Bernard L. Braxton
from Regina C. Gilmore
dated August 3, 1995 ..... App. 15

Letter to Roy Coggins
from Francis J. Henderson
dated July 10, 1995 ..... App. 18

Memorandum to Louis J. Chaney
from Francis J. Henderson
dated May 24, 1995 ..... App. 22

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROY L. COGGINS,
Plaintiff-Appellee,

v.

GOVERNMENT OF DISTRICT OF COLUMBIA,
Defendant-Appellant.

No. 97-2263

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T.S. Ellis, III, District Judge.
(CA-96-1696-A)

Argued: October 29, 1998
Decided: February 19, 1999
Entered: February 19, 1999

Before ERVIN and NIEMEYER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Reversed and remanded by unpublished opinion. Judge Ervin wrote the opinion, in which Judge Niemeyer and Senior Judge Butzner joined.

COUNSEL

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

ERVIN, Circuit Judge:

This is an appeal of a jury verdict in a Title VII wrongful discharge action. Roy L. Coggins ("Coggins"), a Chief Steward at the District of Columbia ("the District") Department of Corrections prison in Lorton, Virginia ("Lorton Facility"), was allegedly fired because he refused to complete required annual evaluations of his subordinates despite repeated requests from his immediate supervisor, Francis Henderson ("Henderson"). Coggins, a Caucasian, sued the District for conspiring to create a pretext to fire him and to replace him with a less-qualified African-American. A jury awarded Coggins $50,000 for pain and suffering. The district court denied the District's motion for judgment as a matter of law and awarded Coggins $11,053.40 in back pay and $48,375 in legal fees. On review of the trial record, we find no evidence that the decision makers who terminated Coggins were motivated by racial animus. Accordingly, because no reasonable jury could find that the District terminated Coggins because of his race, we reverse the judgment of the district court and remand the case with instructions to enter judgment for the defendant.

I.

Roy L. Coggins was fired because he allegedly refused to complete required annual personnel evaluations of

his subordinate staff. Both sides agree that Coggins never completed the evaluations.

In early May of 1995, Henderson, an African American, gave Coggins a direct order to complete performance evaluations of Coggins' culinary staff by May 22, 1995. On May 18, 1995, Coggins wrote a memorandum to Henderson and his superiors "requesting to be relieved of the duty of evaluations until all is resolved" in the Bessye Neal case because "I continue to have a cease and desist order on me" and "I do not want to be accused of tampering with witnesses."

Coggins was one of several named defendants in a class-action sexual harassment lawsuit. See, e.g., Bessye Neal v. Director, District of Columbia Department of Corrections, No. CIV.A.93-2420 (RCL, 24), 1994 U.S. Dist. LEXIS 21338 (D.D.C. Aug. 25, 1994). One of Coggins' subordinates, Denise Hessing, had filed charges of sexual harassment against Coggins. Two other subordinates were witnesses in the case. In spite of the ongoing lawsuit, Hessing and the two witnesses were never transferred from Coggins' staff. Coggins continued to maintain supervisory responsibility over them until his termination. On May 24, 1995, Henderson met with Coggins about the evaluations. During this meeting, Coggins asked Henderson if Henderson had forwarded Coggins' May 18th memorandum up the chain-of-command. Henderson responded that he had refused to send the memorandum up the chain-of-command because the memorandum had coffee stains on it and he believed that his superiors would think less of him if he sent them a stained document. At this meeting, Henderson gave Coggins a memorandum dated the same day that relieved Coggins of his responsibility to evaluate Hessing, the plaintiff in Bessye Neal, but still ordered Coggins to rate the remaining staff members, including the two witnesses in the harassment case, by the close of business on June 1, 1995. Henderson then ordered Coggins to accompany him to the

office of Henderson's boss, Vincent Gibbons ("Gibbons"), a Caucasian and the Warden of the Central Facility.

At this second meeting, Coggins repeated his concerns to Gibbons. Since no other member of Coggins' staff was a member of the protected class and since Henderson was already rating Hessing, Gibbons ordered Coggins to complete the rest of the evaluations because in so doing Coggins would not be violating any court order. Coggins still refused to complete the evaluations.

During either this or a later meeting that day, Gibbons contacted Mark Leavitt, another Caucasian, who was the Deputy Director of Administration for the Department of Corrections and the liaison between the Office of Corporation Counsel and the Department of Corrections for the Bessye Neal case. Leavitt confirmed that neither Hessing nor the two witnesses were members of the protected class and that Coggins could rate all of them. Coggins still refused to comply.

Later on May 24th, Coggins, accompanied by his wife Becky and a union representative, returned to Gibbons' office for yet another meeting with Gibbons. Although Coggins claims that he then agreed to rate all of his subordinates, but would do so under "duress," Gibbons does not remember Coggins making this concession. Henderson was not present at this meeting.

At or about the same time Coggins was meeting with Gibbons, Henderson was in his own office writing a Request or Advance Notice of Proposed Action, in which he recommended that Coggins be fired for insubordination. Although this is the harshest penalty available, it was well within Henderson's discretion to fire Coggins under the District's personnel policy. See D.C. Personnel Regs. pt. I, ch. 16, tbl. 1618.1(5) (1990). Henderson made this recommendation on May 24th despite the fact that in his last memorandum to Coggins, Henderson had given Coggins until June 1st, eight days later, to complete the evaluations.

Henderson also forwarded Coggins' May 18th memorandum up the chain-of-command, coffee stains notwithstanding.

Coggins claims that he suffered severe health problems as a result of these meetings and the pressure placed upon him by Henderson. On May 24th he sought medical treatment while on his way home from work and was prescribed valium. He took the valium and became ill. Coggins apparently experienced a harmful interaction between the valium and other medication he was taking at the time. He was subsequently hospitalized from May 24 through August 1995. Coggins claims that this hospitalization prevented him from completing the evaluations by the June 1st deadline because by the time he was released from the hospital, he had already been fired.

While Coggins was hospitalized, Henderson prepared and sent to Coggins an Advance Notice of Proposed Action, in which Henderson formally charged Coggins with insubordination. This Notice also advised Coggins: (1) that Coggins had the right to respond to the charge with any defenses available; (2) that any response should be forwarded to the Disinterested Designee assigned to this action, Regina Gilmore (an African-American); (3) that Gilmore would make a recommendation to Bernard Braxton, the Deputy Director for Institutions and the Deciding Official assigned to this action; and (4) that Coggins could obtain copies of the evidence upon which this charge was based. Although Coggins received two copies of this Notice, he did not file a written response.

In early August, the Disinterested Designee, an independent official designated by regulation as an internal check on the disciplinary process, agreed that, based upon the information made available to her, Coggins was insubordinate. The Designee then recommended that Coggins be punished with a reduction in rank and a 45-day suspension without pay.

On August 14, 1995, the Deciding Official Braxton wrote a letter informing Coggins that he would be fired for insubordination. Gibbons recused himself from these proceedings because of his personal involvement in the two meetings. Although Braxton drafted the termination letter, it was ultimately reviewed and signed by another Caucasian Warden Paul Krull ("Krull"). Later, the District reversed its termination decision and reinstated Coggins, placing him on suspension.

II.

This Court reviews the district court's denial of a motion for judgment as a matter of law under Rule 50(b) de novo . See Fed. R. Civ. P. 50(b). If there is evidence upon which a jury could reasonably find in favor of Coggins, this Court must affirm the final verdict. Further, in reviewing the record, this Court is "not free to weigh the evidence or to pass on the credibility of the witnesses" but instead must "view the evidence most favorably to [Coggins] and give [Coggins] the benefits of all reasonable inferences from the evidence." United States v. Tobias, 899 F.2d 1375, 1378 (4th Cir. 1990) (citations omitted).

The parties do not dispute that before the disagreement that ultimately led to his termination, Roy L. Coggins was an exemplary employee. By all accounts, Chief Steward Coggins was responsible for quickly transforming his dining hall, the largest in Lorton Facility, from a substandard liability into an exemplary operation. His immediate supervisor, Acting Deputy Warden for Support Services Francis J. Henderson, volunteered during cross-examination that Coggins' previous job performance had been "outstanding." Examining the record in the light most favorable to Coggins, there was enough evidence for a reasonable jury to conclude that Henderson harbored racial animus against Coggins. It is undisputed that Henderson made the initial recommendation on May 24, 1995 which

eventually resulted in Coggins' termination on August 14, 1995.

The central issue in this appeal is the relationship between Henderson's alleged racial animus and the ultimate decision to terminate Coggins. The key question is whether there was a nexus between (1) the racial animus that allegedly motivated Henderson's initial recommendation for termination; and (2) the ultimate rationale relied upon by Henderson's superiors in actually terminating Coggins. Coggins argues that because Henderson's superiors blindly accepted Henderson's racially-motivated recommendation, their ultimate decision was motivated by racial bias. The District argues that regardless of whether Henderson's initial recommendation was racially motivated, the ultimate decision was made by independent, unbiased decision makers who relied upon the legitimate, nondiscriminatory rationale that the District's personnel policies authorize termination for insubordination.

This Court has long recognized two methods of proving employment discrimination: the conventional approach and the judicially-created, shifting burden-of-production scheme. See generally, O'Connor v. Consolidated Coin Caterers, Corp., 56 F.3d 542, 545-46 (4th Cir. 1995) (stating two schemes of proof), rev'd on other grounds, 517 U.S. 308 (1996); EEOC v. Clay Printing, Co., 955 F.2d 936, 940 (4th Cir. 1992) (stating that discrimination may be proven "under ordinary standards of proof, by direct or indirect evidence relevant to and sufficiently probative of the issue"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-06 (1973) (holding that because employment discrimination is often difficult to prove, plaintiffs are alternatively allowed to prove their case through a judicially-created scheme); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (same). Under either scheme of proof, there is no evidence in the record that proves that the ultimate decision makers who terminated Coggins were motivated by racial animus.

A.

First, under the conventional approach, while there is ample direct and circumstantial evidence that Henderson may have been motivated by racial animus, there is simply no direct or circumstantial evidence that the ultimate decision makers harbored racial animus against Coggins. The fact that both Krull and Gibbons, first and third in Coggins' chain-of-command, are both Caucasian makes any anti-Caucasian bias unlikely.

Although one of the documents relied upon by these decision makers was Henderson's Request for Advance Notice of Proposed Action, there is nothing discriminatory about the document. The facts alleged therein are undisputed by both sides. All Henderson states in the Request is that in his two meetings with Coggins on May 24, 1995 Coggins refused to rate his subordinates.

Even if we accept Coggins' claim that he later agreed to complete the evaluations, Coggins appears to have waived this defense. Despite receiving written notice twice of his right to present any applicable defenses, Coggins did not raise this fact before his termination. His Notice clearly stated, "If you do not wish to reply, a decision will be made based on all of the available information of record."

Moreover, the District independently investigated and verified Henderson's allegations and thereby purged any preexisting discriminatory taint from the final decision. Unrebutted testimony refutes Coggins' claim that the individuals who ultimately terminated him merely "rubber stamped" Henderson's recommendation.

When questioned on cross-examination about Braxton's draft letter, Krull stated that he carefully read over the draft letter, Henderson's two letters, the Disinterested Designee's report, and the Notice previously mailed to Coggins before he personally decided to terminate Coggins. Krull testified that if he had disagreed with the draft letter, he

would have held the letter and told Braxton that termination was inappropriate.

Since Coggins did not offer any evidence to contradict Krull's testimony or credibility, we accept that Krull fairly and impartially ascertained the merit of Henderson's complaint. This inference is supported by the District's own personnel regulations. Although Coggins was not charged with violating this specific provision of the District's personnel code, there is a regulation in the District's personnel code that appears to require Coggins' termination. Henderson wrote in his first letter to Coggins that he had previously counseled Coggins that "D.C. Personnel Regulation 1400.3, District Personnel Manual (DPM) Chapter 14 . . . in part, assigns all heads of departments and agencies the responsibility for assuring impartial, objective evaluations of work performances of employees under their jurisdiction." Accordingly, since Coggins was the head of food service for the Central Facility, his evaluations were an assigned duty and responsibility. The District's regulations give no discretion for"[r]efusal to carry out assigned duties and responsibilities." Even if it is a first offense, the only available punishment is "[r]emoval." See D.C. Personnel Regs. pt. I, ch. 16, tbl. 1618.1(5)(c) (1990).

B.

Second, under the judicially created scheme of proof, although Coggins may have been able to establish a prima facie case of discrimination, he was unable to rebut the District's legitimate, nondiscriminatory reason for his termination, namely that Coggins was insubordinate and such insubordination cannot be tolerated in the tense, paramilitary environment of a prison.

Warden Krull testified that even though the Disinterested Designee did not recommend termination, Krull decided to disregard the Designee's recommendation and to terminate Coggins because the special circumstances

of a prison made insubordination more dangerous than in other employment contexts. Lorton Facility is run as a paramilitary organization where subordinates must follow the lawful orders of superiors without question. As Krull stated, "You can't run a prison when people don't do what they're told to do."

Since the trial proceeded to completion, we need not reexamine the entire prima facie case but rather may focus upon the "specific proofs and rebuttals of discriminatory motivation the parties have intro- duced." Gibson v. Old Town Trolley Tours of Washington, D.C., Inc., No. 97-2044, 1998 WL 786693, at *2, 1998 U.S. App. LEXIS 28389, at *5 (4th Cir. Nov. 12, 1998), quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516 (1993). When denying the District's motion for judgment as a matter of law, the district court erred in ruling that a jury could have reasonably found the District's proferred rationale for termination was pretextual. The district court believed the District's insubordination rationale could be considered pretextual in two ways: (1) that the District erroneously relied upon both Henderson's biased, misleading factual recounting of events and Henderson's unfounded initial charge of insubordination to terminate Coggins and (2) that the jury could have found that "fairly construed, the situation really didn't amount as much to insubordination as to an employee who didn't want to do something that he thought was contrary to law, and officials who were too impatient to deal with him and to deal with his concerns, however valid or invalid they were." Transcript, Volume #7, at 26, Coggins District of Columbia, No. CIVA.96-1966-A (D.D.C. July 25, 997).

Both reasons fail to demonstrate that the District's insubordination charge was pretextual. First, as discussed above, none of the facts related in Henderson's two letters are disputed and any discriminatory taint was subsequently purged by the District's independent inquiry. The second reason at best appears to dispute the sound judgment or fair business practices of the District. Since the District

subsequently reinstated Coggins, this argument may have some merit to it. Nevertheless, this Court is not concerned with judging the District's business or administrative acumen. The sole issue before us is whether Coggins' termination was motivated by racial animus and we have found no evidence to support that premise.

III.

The right to a jury trial is a fundamental right and no action affects this right more than the reversal of a jury verdict. See Neely v. Martin K. Eby Constr. Co., Inc., 386 U.S. 317, 322 (1967) (there is "no greater restriction on the province of the jury"). In certain cases, however, reversal is warranted. On these facts, there simply was no nexus between Henderson's allegedly discriminatory conduct and Coggins' termination. Finding no evidence of racial animus in the actions of the ultimate decision makers, we reverse the jury verdict and remand to the district court for the entry of judgment as a matter of law for the District.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2263
CA-96-1696-A

ROY L. COGGINS
Plaintiff - Appellee

v.

GOVERNMENT OF DISTRICT OF COLUMBIA,
Defendant - Appellant

FILED: March 16, 1999
ENTERED: March 16, 1999

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied,

IT IS SO ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Yours truly,

PATRICIA S. CONNOR
Clerk

By: /s/ Pamela K. Stump
Deputy Clerk

Enclosure(s)

cc: Norman H. Meyer, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

ROY L. COGGINS

vs.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

JUDGEMENT IN A CIVIL
Case No. C.A. 96-1696-A

Entered: July 8, 1997

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgement is hereby entered in favor of the plaintiff, Roy L. Coggins, and against the defendant, Government of the District of Columbia, in the amount of $50,000.00

This judgement is in accordance with the verdict of the jury.

July 8, 1997
Date

Norman H. Meyer, Jr.
CLERK

s/ Peter T. Brown
(By) Deputy Clerk

Government of the District of Columbia
Department of Corrections
Office of Associate Director for Programs
P.O. Box 229
Lorton, Virginia 22199

August 3, 1995

MEMORANDUM

TO BERNARD L. BRAXTON
DEPUTY DIRECTOR OF INSTITUTIONS

FROM
Regina C. Gilmore
Disinterested Designee

SUBJECT
Disinterested Designee Report

RE
Roy Coggins,
Chief Culinary Steward CAA 95-367

CHARGE
Violation of DPM Chapter 16 § 1618

CAUSE5. Insubordination: to wit:
(a) Failure or refusal to comply with written instructions or direct ord1ers by a superior.

PROPOSED
PENALT
Removal

This Notice of Proposed Action was received by the Disinterested Designee on July 12, 1995. The employee's

signature on the certified receipt indicates his receiving notice of proposed action on July 17, 1995. The employee was served notice within the specified forty-five days. The date upon which a final decision should be rendered is August 31, 1995.

The Disinterested Designee spoke with the employee's representative, Rebecca Coggins on July 25, 1995, who stated the response would be submitted in writing by the ten calendar day deadline of July 27, 1995. No hearing was held as defined under DPM Chapter 16, §1613.4 as neither the employee nor his representative requested same and there does not appear to be a dispute of material facts but of circumstances as described by the employee.

Agency charges are that Acting Chief Steward Coggins refused to accept the blank rating forms and to prepare annual evaluations for those he supervises (except Denise Hessing) after receiving both verbal and written direct orders from the Deputy Warden for Support Services and the Warden.

There is no dispute that Acting Chief Steward Coggins did not prepare the annual employee performance evaluations as required in D.C. Personnel Manual Chapter 14, Subpart 1.8, §B. §§5.

Documents indicate that Mr. Coggins was given verbal and written explanations of his responsibility as a supervisor and his concerns regarding retaliation were addressed. Mr. Coggins reports that his Incident Report of May 24, 1995, that he did not resubmit his memorandum of protest as requested by the Deputy Warden and Warden after the document was found to have "spot(s)" on it.

I have reviewed the facts presented by Proposing Officials and the Respondent, and find that charges for cause are sustained.

It is the Disinterested Designee's recommendation that the proposed penalty of removal be reduced to a penalty within the range of not more than a reduction in rank to a non-supervisory position to not less than suspension without pay for forty-five (45) days.

Attachments

cc: Proposing Official
Human Resources Manager
Employee

Government of the District of Columbia
Department of Corrections
Office of Associate Director for Programs
P.O. Box 229
Lorton, Virginia 22199

July 10, 1995

Mr. Roy Coggins
Chief, Culinary Steward
D.C. Department of Corrections
Central Facility
Lorton, Virginia 22199

Dear Mr. Coggins:

Pursuant to Title XVI of the Comprehensive Merit Personnel Act, D.C. Law 2-139, this is an advance notice of at least thirty (30) calendar days of a proposal to remove you from your position of Chief, Culinary Steward, with the D.C. Department of Corrections for the following violation:

DPM Section 1618;

CAUSE 35 Insubordination; to wit: (a) Failure or refusal to comply with written instructions or direct orders by a superior.

The details in support of this cause are as follows:

SPECIFICATION: On May 24, 1995 at approximately 2;50 P.M., I issued verbal and written instructions to you to complete the annual performance ratings for all staff under your supervision, with the exception

of Ms. Denise Hessing. You not only refused to rate the employees, but also failed to accept the written directive and the annual performance rates for your area of responsibility.

At approximately 3:00 p.m., inside the Warden's office, you were issued the exact same order by Warden Gibbons in the presence of Acting Deputy Warden M. L. Brown and myself. You also refused to accept the performance ratings for your staff.

Your act of insubordination by refusing to comply with written instructions or direct orders by a superior will not be tolerated. As such You are being cited for violating Chapter 16 of the District Personnel Manual and your removal from your position of Chief, Culinary Steward is hereby proposed.

You are advised of your right to reply to this proposed action within ten (10) calendar days from the date you receive this letter. You may answer in writing. Your written answer may include written statements of witnesses or affidavits. With prior approval from your supervisor, you are entitled to a reasonable amount of official time, not to exceed ten (10) hours of administrative leave, to prepare your written answer and review the supporting documents.

At the time of the answer, you may raise every defense or matter in extenuation or mitigation of which you have knowledge, or which is relevant to the casus, specification, or proposed penalty. Upon request, yo may be granted an opportunity to answer orally. You have a right to be represented by an attorney or other representative of your choice. Your representative, if an employee of the District government, is also entitled to a reasonable amount of official time (with prior approval from his/her supervisor) not to exceed ten (10) hours of administrative leave, to assist you in preparing your answer. If you are a member of a

collective bargaining unit, you may also have a union representative present. Your written reply, if you decide to make one, should be addressed to the following Disinterested Designee:

Regina Gillmore
Acting Chief, Special Needs
Lorton, Virginia 22079
Telephone (703) 643-1782

Ms. Gillmore will make a written report and recommendation to the Deciding Official, Mr. Bernard L. Braxton, Deputy Director for Institutions, who will make the final decision.

The material upon which this proposed action is based may be reviewed in the office of Human Resource Management, 1923 Vermont Avenue, N.W., Suite NLL-13, Washington, D.C 20001. You may review this material by contacting Mr. Donald K. Roots, Human Resource Manager, at (202) 673-2300.

Consideration will be given to extending the time limit for your answer if you submit a request for an extension this statement should set for the reason(s) for such a request. Full consideration will be given to any answer you submit. If you do not wish to reply, a decision will be made based on all of the available information of record. However, if you do decide to reply, your reply will be given full and careful consideration.

In either case, a written notice of final decision will be issued to you not less than thirty (30) calendar days of the date you receive this letter.

During this advance notice period, you will be retained in an active duty status.

Sincerely,

(signed)

Francis J. Henderson
Acting Deputy Warden

ACKNOWLEDGEMENT OF RECEIPT

_____

Employee
Date

_____

Delivered by
Date

Government of the District of Columbia
Department of Corrections
Office of Associate Director for Programs
P.O. Box 229
Lorton, Virginia 22199

May 24, 1995

MEMORANDUM

TO Louis J. Chaney
Supervisory Personnel Liaison

FROM Francis J.Henderson
A/Deputy Warden for Support Services

SUBJECT Request for Advance Notice of Proposed Action

REF Roy Coggins
Chief, Culinary Steward

Pursuant to District Personnel Manual Chapter 16, an advance notice of proposed action to remove Chief Culinary Steward Roy Coggins from his position with the District of Columbia Department of Corrections is hereby requested.

Specifically, on Wednesday May 24, 1995 at approximately 2:50 p.m., this writer serving in the capacity as Steward Coggin's immediate supervisor issued verbal and written instructions to complete the annual performance ratings for all staff under his supervision with the exception of Ms Denise Hessing. Mr. Coggins not only refused to rate the employees but also to accept the written directive and the annual performance ratings assigned to his area of responsibility.

At approximately 3:00 p.m. inside the Warden's office, Mr.Coggins was issued the exact same order by Warden Gibbons in the presence of Deputy Warden M. L.

Brown and myself. Steward Coggins refused to accept the performance ratings for his staff and stated that he was not going to rate any employees under his supervision.

In accordance with the District Personnel Manual Chapter 16, Section 1603.1 (e) Insubordination, Chief Culinary Steward Roy Coggins is hereby cited for his refusal to carry out assigned duties and responsibilities as required. Therefore, Chief Culinary Steward Roy Coggins' removal is herewith sought for cause.

Please expedite this request accordingly.

Attachment(s)